No. 11,937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate of Burlingame Products Co., Inc., Bankrupt,

Appellant,

vs.

F. W. MACKAY,

Appellee.

APPELLANT'S OPENING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO.

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JURISDICTIONAL STATEMENT.

This is an appeal from an Order of the District Court of the United States for the Northern District of California. The said Order is set forth in the Transcript of Record herein. (Tr. p. 23.)

Appellant, John O. England, is Trustee of the Estate of Burlingame Products Co., Inc., a corporation, Bankrupt, a proceeding pending before said District Court. Order Approving the Bond of Trustee was made on April 22, 1947. (Tr. pp. 3-4.)

The action arises out of the Petition for Order to Show Cause of Appellant Trustee (Tr. pp. 4-7) and Order to Show Cause of Referee in Bankruptcy Bur-

ton J. Wyman (Tr. p. 8) upon Appellee, F. W. MacKay, to appear and show cause why an Order should not be made and entered requiring him to turn over to the Appellant Trustee all of his assets, or to pay to Appellant a sum of money sufficient with the moneys then in the possession of the Trustee, to satisfy proper expenses of administration of said bankruptcy proceeding and all of the claims of creditors filed therein.

Said Petition was filed, and said Order to Show Cause issued, on July 30, 1947. Appellee filed his answer or response thereto (Tr. p. 9) on September 8, 1947, on which date the Referee in Bankruptcy duly and regularly held a hearing and, the matter having been submitted, made and filed his Order granting the Petition of the Appellant Trustee on September 26, 1947. (Tr. pp. 15-19.)

On October 20, 1947, pursuant to the provisions of Title 11, Chapter 5, Section 67(c), U.S.C., Appellee filed his Petition for Review of the Order of the Referee in Bankruptcy, dated September 26, 1947. (Tr. pp. 19-23.)

The Petition was thereafter heard before the District Court and on January 30, 1948, said Court made its Order setting aside the Order of the Bankruptcy Referee. (Tr. pp. 23-27.) Under authority of the Judicial Code, Title 28, U.S.C., Chapter 6, Section 225(c) and the Bankruptcy Act, Title 11, U.S.C., Chapter 4, Sections 47 and 48, appeal was taken to this Court to review the said Order of the Court below. Notice of Appeal was filed on February 28, 1948 (Tr. pp. 27-28) and on April 8, 1948, the District Court

extended the time for filing the Record on Appeal to May 18, 1948. (Tr. p. 28.) On May 18, 1948, the time was further extended to May 28, 1948 (Tr. p. 23) and this appeal and the Transcript of Record were filed and docketed in this Court on May 24, 1948.

STATEMENT OF THE CASE.

(a) Nature of the Case.

On January 22, 1947, certain creditors of the Burlingame Products Co., Inc., a corporation, the bankrupt herein, filed a Petition that it be adjudged a bankrupt, the alleged act of bankruptcy being the execution of an Assignment for the benefit of its creditors on November 5, 1946, to one John Costello of all of its assets, property and effects. Order of Adjudication of the bankrupt was entered by the District Court on February 24, 1947. (Tr. pp. 2-3.)

Thereafter, Appellant was duly appointed Trustee of said bankrupt estate and caused an examination to be had, under Section 21-a of the Bankruptcy Act, of the Appellee, F. W. MacKay, and certain officers of the bankrupt corporation. (Tr. pp. 35-88.)

From such examination it was established that the bankrupt corporation was organized under the laws of the State of California on March 16, 1946. (Tr. pp. 42-43.) No Application was ever filed with the California Commissioner of Corporations for a Permit to issue shares of stock of said corporation and no shares of stock were ever issued.

The corporation was organized at the suggestion of Appellee (Tr. p. 52) for the purpose of taking over all of the assets of Western Products Company which had been turned over to Appellee in return for his cash investments therein. (Tr. pp. 67 and 72-73.) Western Products Company was in the same line of business, to-wit, the manufacture of birdcages and bird supplies. (Tr. p. 51.) Appellee had financed the establishment of Western Products Company (Tr. p. 65) which was thereafter operated on a profit sharing arrangement (Tr. pp. 65-66) by Joseph Mauborgne, later President of the bankrupt, until the organization of the bankrupt corporation. (Tr. pp. 66-68.) There was merely a change of name of the business from Western Products Company to that of the bankrupt corporation, and the existing liabilities of the former were paid with funds of the bankrupt. (Tr. p. 83.) Mauborgne testified that he ran Western Products Company with the "financial backing" of Appellee. (Tr. p. 49.) The latter paid for electric wiring required by the bankrupt in its place of business (Tr. p. 42) and made various suggestions regarding the plant and equipment of the bankrupt. (Tr. p. 63.)

Neither Mauborgne, the President of the bankrupt, nor MacNeil, the Secretary-Treasurer thereof, knew how many shares of stock they were to receive or the number which would be allocated to them. (Tr. pp. 53 and 57-58.) MacNeil invested no money (Tr. p. 38), but was asked by Appellee to act as Secretary-Treasurer to "look after the money part of the busi-

ness" (Tr. p. 39) during the absence of Appellee from this country.

Mauborgne testified that he had no financial interest in the corporation. (Tr. pp. 49 and 54.) Mauborgne further testified that he did not know who had owned Western Products Company, predecessor to the bankrupt (Tr. p. 50); that Appellee was not his employer (Tr. p. 51) and that he was not a copartner with Appellee. (Tr. p. 60.) All moneys required for the operation of the bankrupt other than those derived from the sale of the products of the corporation were contributed by Appellee (Tr. pp. 54-55), and the latter procured in his name the lease of the business premises of the bankrupt, paid in advance the first and last month's rental thereon and he later transferred the lease to the bankrupt. (Tr. pp. 80-81.) It was Appellee who had located the business premises for the bankrupt. (Tr. p. 58.)

(b) Issues Presented.

On the basis of the foregoing facts and testimony the Referee found that the bankrupt corporation was organized in March, 1946 (Tr. p. 16) and that at no time has any Permit to issue shares of capital stock thereof to the officers and/or directors of said corporation or anyone else ever been issued. (Tr. p. 17.) The Referee further found that the corporation was organized at the instigation of Appellee and for his personal benefit, and not otherwise (Tr. p. 17), and that said corporation now has and at all times since its organization in truth has been Appellee who, as an

individual, disregarded the substance and/or form of said corporation and treated the affairs of said corporation as his own and as a part of his own enterprise. (Tr. p. 17.) The Referee also found that the assets of the bankrupt, as such alone, are insufficient to satisfy the claims of creditors of the bankrupt corporation which, under the Bankruptcy Act, are and/or will be entitled to allowance in the bankruptcy proceeding (Tr. p. 17) and that all debts contracted in the name of the corporation in truth were contracted by, in behalf of and/or for the ultimate benefit of Appellee as an individual and not otherwise, and that Appellee, as such individual, and said bankrupt are debtors, and each of them, is a debtor, of the creditors, who, of record in said bankruptcy proceeding, now appear or who later may appear as creditors only of said bankrupt, having allowed or allowable claims in the bankruptcy proceeding. (Tr. pp. 17-18.)

As a Conclusion of Law, the Referee thereupon held that Appellant Trustee is entitled to have turned over to the estate of the bankrupt all assets of Appellee, as an individual, or at least so much thereof as are needed for the purpose of realizing therefrom sufficient money with which (together with such money as may be derived from the assets of the bankrupt) to pay all legal expenses of administration and also to satisfy all allowed and/or allowable claims in said bankruptcy proceeding. (Tr. p. 18.)

Based upon the foregoing statement of the nature of the case and summary of facts, the issues presented are:

1. Whether the bankrupt corporation was the *alter ego* of Appellee and the instrumentality through which, for convenience, he transacted his business and that, therefore, the corporate entity may be disregarded and Appellee held to be liable, individually, for the debts contracted in the name of the bankrupt.

2. Whether the District Court erred in holding that the Referee had acted, and was, without jurisdiction to make his Order of September 26, 1947, directing Appellee to turn over his assets to Appellant as Trustee.

SPECIFICATION OF ERRORS.

1. The District Court erred in reversing the Referee's Order on Petition that Appellee turn over his assets.

2. The District Court erred in holding that the Referee had acted, and was, without jurisdiction to make his Order directing Appellee to turn over his assets to Appellant Trustee.

3. The District Court erred in holding that Trustee's Petition for an Order to Show Cause against said Appellee did not state facts or grounds sufficient to support any proceeding nor the relief therein prayed nor any relief whatsoever.

4. That the District Court erred in disregarding the mandatory provisions of Supreme Court General Order in Bankruptcy No. 47 requiring the Judge of the District Court to accept the Findings of Fact of the Referee unless clearly erroneous, in that said Findings of Fact are supported by the evidence.

ARGUMENT.

In presenting his argument Appellant believes that all the facts essential thereto have been summarized with appropriate references to the Transcript of Record in his statement of the case and therefore, in the interest of brevity, will rely upon such statement of facts except where further detail requires specific references.

I.

THE DISTRICT COURT ERRED IN REVERSING THE REFEREE'S ORDER ON PETITION THAT APPELLEE TURN OVER HIS ASSETS TO APPELLANT TRUSTEE.

The District Court in its Order (Tr. pp. 23-27) reversing the Order of the Referee (Tr. pp. 15-18) based such reversal upon two grounds, namely, that (1) the Referee had acted without jurisdiction, and (2) that in not sustaining the contention of Appellee that the Petition of Appellant did not state facts or grounds sufficient to support any proceeding nor the relief therein prayed nor any relief whatsoever, the Referee fell into error.

As to the first point, Appellant treats this more fully in Paragraph II of this Argument and cites therein numerous authorities of this and other courts which hold that the question of summary jurisdiction of the Bankruptcy Court can only be raised prior to the entry of a final order by a referee. The Transcript of Record discloses no such objection by Appellee. Appellee did not object to the jurisdiction of the Referee until long after his Order had become

final. For this reason, it is respectfully urged that the District Court erred in finding that the Referee had acted without jurisdiction.

The District Court further held that Appellant's Petition did not state facts or grounds sufficient to support any proceeding nor the relief therein prayed. In his Response to the Order to Show Cause (Tr. p. 9) Appellee made such contention, which was overruled by the Referee. (Tr. p. 96.) As appears therein, it was the sole objection raised by Appellee.

This objection of Appellee may be likened to an attempt by him to demur to the Petition on the ground that it did not state facts sufficient to justify the relief sought. In fact, counsel for Appellee on his appearance in opposition to the Order to Show Cause stated that "there is an objection in the nature of a general demurrer, that the petition does not state facts, or grounds justifying the relief sought." (Tr. p. 88.) Demurrers have, of course, been abolished in the District Courts. (Rule 7, Rules of Civil Procedure for the District Courts of the United States.) And Supreme Court General Order in Bankruptcy No. XXXVII provides that the Rules of Civil Procedure for the District Court shall, in so far as they are not inconsistent with the Bankruptcy Act or with the Supreme Court General Orders in Bankruptcy, be followed as nearly as may be.

Aside from this, however, Appellant contends that the Referee did not err in overruling such objection. The Petition set forth that from the examination of Appellee and the bankrupt's officers, it appeared, and

Appellant so alleged the fact to be, that the bankrupt corporation was organized; that no Permit to issue shares of capital stock thereof had ever been obtained from the California Corporation Commissioner; that no shares of capital stock had ever been issued to any of the officers or directors of the bankrupt or to anyone else; that the bankrupt corporation was organized at the instigation of Appellee and that Appellee and the bankrupt corporation were and are in reality the same. Such allegations, it is respectfully urged, warranted the Referee in overruling the objection of Appellee to the sufficiency of Appellant's Petition.

II.

THE REFEREE HAD SUMMARY JURISDICTION TO MAKE HIS ORDER AND APPELLEE'S CHALLENGE TO SUCH JURISDICTION CAME TOO LATE.

In his Petition to the District Court for Review of the Referee's Order, Appellee did not challenge the summary jurisdiction of the Referee to make such Order, and the Transcript of Record discloses no such challenge before the Referee. *He first raised the question of jurisdiction* in his closing brief filed with the District Court. Appellant contends that this challenge came too late and that the District Court erred in holding the Referee acted without jurisdiction. (Tr. p. 27.)

The decisions of a Referee are not reviewable until embodied in an Order, and a final Order or finding by a Referee is a prerequisite to such Review.

To this effect is the decision of *In re Prindible,* 115 F. (2d) 21 (C.C.A. Pa.), where the Court said:

> "It is of course elementary that, save for excepted instances statutorily prescribed, an appeal lies only from a final order, judgment, or decree. *Zoline, Federal Appellate Jurisdiction & Procedure,* 3rd ed., Sec. 35. And, to be final, the order, judgment, or decree must be complete as to all parties and as to the whole subject matter therein involved. *Collins v. Miller,* 252 U. S. 364, 64 L. Ed. 616, 40 S. Ct. 347; *Wuerpel v. Canal-Louisiana Bank & T. Co.* (5 Cir.), 231 F. 934, 36 A.B.R. 802. This requirement applies equally to actions taken by a referee in bankruptcy. His final order or finding is a prerequisite to a petition for court review. *Amendatory Act of 1938,* Sec. 2, subd. a, 11 U.S.C.A. Sec. 11, subd. a, also Sec. 39, subd. c, 11 U.S.C.A., Sec. 67, subd. c."

Also, it was said in *In re Pearlman,* 16 F. (2d) 20 (2 Cir.):

> "* * * the occasion seems to us apt to restate the practice applicable to petitions for review of referees' orders. The proceeding is in substance an appeal from the court of bankruptcy—i.e., the referee—to the District Court."

It has been held many times that adverse claimants may challenge the summary jurisdiction of the Bankruptcy Court at any time prior to the entry of a *final order* by a referee.

Louisville Trust Co. v. Comingor, 184 U. S. 18, 46 L. Ed. 413, 22 S. Ct. 293;

In re Bergstrom, 1 F. (2d) 288 (C.C.A. 8th);

In re Horgan, 158 F. 774 (C.C.A. 1st);

In re White Satin Mills, 25 F. 313 (D.C.).

The leading case upon this point appears to be *Cline v. Kaplan,* 323 U. S. 97, 89 L. Ed. 97, 65 S. Ct. 155, 57 A.B.R. (N.S.) 195. This was a turnover proceeding brought by a Trustee before the Referee to recover certain real and personal property. The defendants, who were later conceded to be adverse claimants, answered on the merits and participated in the hearings, but before any order was entered, interposed first an oral and later a written motion challenging jurisdiction. The Appellate Court admitted the well settled proposition that a jurisdictional defense in a summary action embraces merely a procedural right which may be waived by failure to raise an appropriate objection in due time. The Court held, however, that the defendants, by making an express objection before a final Order was entered by the Referee, had done so in time, and that their prior conduct did not constitute an acquiescence to summary jurisdiction. This conclusion was supported by the Supreme Court, which said:

> "Consent is wanting where the claimant has throughout resisted the petition for a turnover order and where he has made a formal protest against the exercise of summary jurisdiction by the bankruptcy court before that court has made a final order. (*Louisville Trust Co. v. Comingor, supra.*) In the Comingor Case although the claimant 'participated in the proceedings before the referee, he had pleaded his claims in the outset and he made his formal protest to the exercise of jurisdiction before the final order was entered. Id. 184 U.S. at 26, 46 L. Ed. 416, 22 S. Ct. 293, 7 Am. B. R. 421. This, it was held, negatived

consent and thereby the right to proceed summarily. Before the matter went to the referee for determination, respondents explicitly raised objection to the disposition of their claim by summary proceedings. * * * The established practice based on the criteria of the Comingor Case was thus entirely satisfied. * * *"

A decision of this Circuit, in which a Writ of Certiorari was denied by the Supreme Court, follows this rule:

"If an adverse claimant is unwilling to submit to an adjudication of his claim in a summary way there is no good reason why he should not be required explicitly to inform the referee of his objection. Compare *Cline v. Kaplan,* supra; *Hall v. Goggin,* 9 Cir., 148 F. 2nd 774; *In re Realty Associates Securities Corp.,* 2 Cir., 98 F. 2nd, 722. He will not be permitted to speculate on the outcome of the proceeding, and then, if he loses the decision, for the first time understandably protest the procedure."

Honeyman v. Hughes, 9 Cir., 156 F. (2d) 27 (Writ of Certiorari denied Oct. 14, 1946, 67 S. Ct. 99).

The Appellee did not raise the question of whether the Referee had jurisdiction prior to the entry by the Referee of his final Order in this proceeding.

Other cases in point are the following:

"Substantially the only contention made by appellant is that the bankruptcy court was without jurisdiction to adjudicate the controversy in a summary proceeding. But, if the right to object to such jurisdiction ever existed (a point we do

not decide), appellant waived it. Where, as in such a case, the question is one of personal privilege, only, a defendant cannot appear generally, and, after submitting to a trial of the controversy upon its merits, be heard to object to the jurisdiction."

Rhode v. Durst, 9 Cir., 28 F. (2d) 980.

"It is sugested, in the trustee's brief, that question may be raised as to the jurisdiction of the referee to order in summary proceeding the payment to the trustee of an alleged preference. The record is barren of any intimation that Dutchland (petitioner claimant) objected to the proceeding before the referee, and it is now too late to raise that question of jurisdiction. *MacDonald v. Plymouth County Trust Co.,* 286 U.S. 263, 52 S. Ct. 505, 75 L. Ed. 1093."

In re Loring (D.C. Mass.), 30 F. Supp. 758.

"When the parties appeared before this court for argument for the first time said attorneys asserted that neither this court nor the referee had or have any jurisdiction of the subject matter of the action. * * * When they appeared in the proceeding before the referee, made proof and urged the arguments they did, such, under the authorities, constituted a consent in law to the proceedings against them. Under the circumstances the tardy objection above-mentioned can be of no effective avail. Among the host of decisions the following establish the lack of merit in such belated contention of said attorneys: *Rhode v. Durst,* 9 Cir., 28 F. 2nd 980; *In re Murray,* 7 Cir., 92 F. 2nd 612; *In re Ackermann,* 6 Cir., 88 F. (2nd) 971; *In re West Produce Corporation,*

D.C., 33 F. Supp. 991; *Bachman v. McCluer,* 8 Cir., 63 F. 2nd 580. It must, therefore, be held that the court now has, and that the referee did have, jurisdiction."

In re Dungeness Timber Co., Inc., D.C. Wash., 50 F. Supp. 370-371.

"The first point is met by the fact that the respondents raised no timely objection to the summary proceeding. They answered the trustee's petition and went to trial without contending that the referee lacked power and that only a plenary suit would lie. Such a submission to the jurisdiction was sufficient even though there was no formal consent. *Page v. Arkansas Natural Gas Corp.,* 286 U.S. 269, 271, 52 S. Ct. 507, 508, 76 L. Ed. 1096, affirming 8 Cir., 53 F. (2nd) 27, 35; *In re Hopkins,* 2 Cir., 229 F. 378, 380. Objection was first made after the referee had issued his 'turnover order' and at the time when the proceeding was on review before the district judge. This was too late."

In re Pinsky-Lapin & Co., Inc., 2 Cir., 98 F. (2d) 776.

Under the circumstances existent herein, to-wit: failure of the Appellee to make timely objection to the summary jurisdiction of the Bankruptcy Referee, and upon the basis of the rule laid down by the above-cited decisions, it would conclusively appear: (1) that the Referee did have jurisdiction to make his Order directing Appellee to turn over his assets to Appellant Trustee, and (2) that the District Court erred in holding the Referee lacked such jurisdiction.

III.

THE FACTS SUPPORT THE FINDING OF THE REFEREE THAT APPELLEE AND THE BANKRUPT ARE ONE AND THE SAME.

It will be noted that the District Court in its Order on Petition for Review of Referee's Order (Tr. pp. 23-27) did not choose to decide whether the facts developed in the bankruptcy proceeding justified a finding that the corporation was organized at the direction of Appellee for his personal benefit and that Appellee and the bankrupt were and are in reality the same and that Appellee is equally liable with the bankrupt corporation for debts contracted in its name.

Appellant believes that the facts surrounding the organization of the bankrupt corporation clearly support the Findings of the Referee that the corporation and Appellee were in truth one and the same. Further, that from this finding it may be said that a Turnover Order directed against Appellee is, in fact, a Turnover Order directed against the bankrupt. Appellee is in the same position as though he had been doing business as an individual under the fictitious name of Burlingame Products Co. He also has never asserted that he does not have assets or the moneys required to satisfy the Order of the Referee, and the necessary basis for the Turnover Order against him therefore exists.

It is the law in California as elsewhere that, although a corporation is usually regarded as an entity separate and distinct from its stockholders, both law and equity will, when necessary to circumvent fraud,

protect the rights of third persons and accomplish justice, disregard this distinct existence and treat them as identical. Vol. 6a *Cal. Jur.* 75; *Erkenbrecher v. Grant,* 187 Cal. 7, 200 Pac. 641; *Minifie v. Rowley,* 187 Cal. 481, 202 Pac. 673.

There are many decisions in support of such rule. Among them are *Sweet v. Watson's Nursery,* 33 C.A. (2d) 699, 92 P. (2d) 812, in which the Court declared:

> "The rule is clear that where a corporation is merely the business conduit of an individual or partners, the courts will look through the corporation to the individual. *Wenban Estate Inc. v. Hewlett,* 193 Cal. 675, 695, 227 P. 723; *Continental Securities etc. Co. v. Rawson,* 208 Cal. 228, 238, 280 P. 954. When a corporation is organized or perpetuated for the particular purpose of carrying out the plans of partners or associates whether the corporation be deemed a 'one-man' corporation, or as here claimed, a 'two-man' corporation, the rule is the same. (Citing cases.)"

and *Watson v. Commonwealth Ins. Co. of N. Y.,* 8 C. (2d) 61, 63 P. (2d) 295, where it was said:

> "There was no error in reforming the contract to impose an individual obligation upon the plaintiff since this is clearly an appropriate case for the recognition of the acts of a corporation as in reality those of individuals. The two requirements are that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and that adherence to the fiction of separate existence would, under the circumstances, promote fraud or injustice. On the second score it is sufficient

that it appear that recognition of the acts as those of a corporation only will produce inequitable results."

As said in *Colonial Trust Co. v. Montello Brick Works,* 172 Fed. 310:

"While we recognize the legal principle that a corporation does not lose its entity by the ownership of the bulk or even the whole of its stock by another corporation * * * yet it is equally well settled courts will look beyond the mere artificial personality which incorporation confers, and, if necessary to work out equitable ends, will ignore corporate forms."

A leading case in California is *Wenban Estate v. Hewlett,* 193 Cal. 675, 695, 227 Pac. 723. In this decision appears the following language:

"While it is the general rule that a corporation is an entity separate and distinct from its stockholders, with separate, distinct liabilities and obligations, nevertheless there is a well-recognized and firmly settled exception to this general rule, that, when necessary to redress fraud, protect the rights of third persons, or prevent a palpable injustice, the law and equity will intervene and cast aside the legal fiction of independent corporate existence, as distinguished from those who hold and own the corporate capital stock, and deal with the corporation and stockholders as identical entities with identical duties and obligations.

"Accordingly, it has been held that upon a sufficient showing that a corporation is but the instrumentality through which an individual, who is the sole owner of all of the corporate capital

> stock, for convenience transacts his business, equity, looking to the substance rather than the form of the relation, and the law as well, will hold such corporation obligated for the acts of the sole owner of the corporation to the same extent and just as he would be bound in the absence of the existence of the corporation."

In the present proceeding it must be remembered that no shares of stock of the bankrupt have been issued, there are no stockholders thereof in existence, and the assets of the bankrupt were, in Appellee's own words (Tr. p. 73), "turned over" to him for the money he had invested in the predecessor business of Western Products Company.

A federal court sitting in bankruptcy has full equity powers and is vested with authority to follow the general doctrine above set forth (*Pepper v. Litton,* 60 S. Ct. 238, 308 U.S. 311, 84 L. Ed. 281, 41 A.B.R. (N.S.) 279), and, Appellant submits, even if no shares of stock have been issued.

IV.

THE REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD BE SUSTAINED.

As heretofore stated, the District Court did not determine that the Referee had erred in finding, based upon the facts herein, that the bankrupt and Appellee were one and the same and that the debts of the corporation were the debts of Appellee individually. But if it be assumed that such was its intention, Appel-

lant urges that this was error in that it disregarded the mandatory provisions of Supreme Court General Order in Bankruptcy No. XLVII, which requires that:

> "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous."

It is to be noted that in the Order of the District Court (Tr. pp. 23-27) the only mention of the Findings of Fact of the Bankruptcy Referee (Tr. pp. 16-18) is found in lines 24 to 28 of page 25 of the Transcript of Record, and the language of the Court immediately following its only mention of the Findings of Fact of the Referee clearly shows the District Court confused the Petition upon which the Order of Adjudication was entered with the Petition of the Trustee for the Order to Show Cause against the Appellee MacKay.

The District Court did not predicate its decision reversing the Order of the Referee on erroneous Findings of Fact but solely on his lack of jurisdiction and on the sole contention in the Petition of Appellee that the Petition of the Appellant Trustee failed to state facts or grounds sufficient to support the relief sought by the Bankruptcy Trustee. Heretofore, in the within Brief, the attention of this Court has been respectfully directed to the Response of Appellee (Tr. p. 9) to the Order to Show Cause, and particularly attention is called to the allegations in paragraph one of

said Response. These allegations are in the nature of a demurrer to the Petition of said Trustee and in no way constitute an objection to summary jurisdiction of the Bankruptcy Referee; in fact, counsel for MacKay has described the above mentioned Response to the Order to Show Cause of the Referee dated July 30, 1947 (Tr. p. 8), as a Demurrer, and the attention of this Court is respectfully directed to the statement of Mr. Moran, counsel for MacKay, appearing on page 88 of the Transcript of the Record, lines 24 to 28.

The Appellant respectfully submits that there is no error in the Findings of Fact of the Referee and that the mandatory provisions of Supreme Court General Order XLVII required the District Court to accept all of the Findings of Fact. The evidence adduced at the hearing before the Referee and discussed in detail heretofore in the within Brief, clearly proves that Appellee MacKay disregarded the substance and form of the bankrupt corporation and treated its affairs as his own and as a part of his own enterprise. The evidence clearly supports the Findings of Fact and Conclusions of Law and Order of the Referee in Bankruptcy, and the District Court has failed to show in its Order reversing the Referee any error in the Findings of Fact of the Referee.

Unless it clearly appears that there was error or mistake on the part of the Referee, his Findings should not be set aside. This principle of law, in connection with the bankruptcy proceedings, is to be found in numerous decisions of the Circuit Courts

and in *McDonald v. First National Bank of Attleboro,* (1 C.C.A.), 70 F. (2d) 69, 25 A.B.R. (N.S.) 193, the Circuit Court said, on page 71, in reversing an Order of the District Court overruling a decision of a Referee in Bankruptcy:

> "A referee's findings 'have every reasonable presumption in their favor, and should not be set aside or modified, unless it clearly appears that there was error or mistake on his part.' Maxey, J., Southern Pine Company v. Savannah Trust Company, 141 F. 802, 805 (C.C.A. 5). See, too, Ohio Valley Bank Company v. Mack, 163 F. 155, 24 L.R.A. (N.S.) 184 (C.C.A. 6); In re Swift (D.C.), 118 F. 348. Upon a careful examination of the record, we are unable to agree with the District Judge. The critical findings of the referee do not appear to us to be clearly wrong."

In *Morris Plan Industrial Bank v. Henderson* (2 C.C.A.), 131 F. (2d) 975, 51 A.B.R. (N.S.) 79, Judge Learned Hand, speaking for the Court, on page 977, said:

> "* * * and the added weight to be attached to a referee's finding, or to a judge's (if he sees the witnesses) depends upon the fact that he has in effect had evidence before him which cold print does not preserve. So far, therefore, as the words themselves leave any latitude, the referee's conclusion ought to prevail because we cannot appraise the cogency of the lost evidence. In the end, as we have often said, the responsibility for the right conclusion remains the judge's as indeed it does ours; In re Kearney, 2 Cir., 116 F. (2d) 899; but *we have again and again held that except in plain cases he should accept the referee's*

findings. In re Slocum, 2 Cir., 22 F. (2d) 282; In re Gondon & Gelberg, 2 Cir., 69 F. (2d) 81; In re Goldner-Siegel Corporation, 2 Cir., 71 F. (2d) 152; In re Wisun & Golub, Inc., 2 Cir., 84 F. (2d) 1; In re Patrizzo, 2 Cir., 105 F. (2d) 142; In re Connecticut Co., 2 Cir., 107 F. (2d) 734. We therefore hold that the question is the same in this court as it was in the district court.

That being true, *we cannot see any adequate reason for refusing to accept the referee's finding upon the first objection.*" (Italics ours.)

The Circuit Court, in the above decision from which the excerpt is quoted, also reversed the District Court Order overruling the decision of the Referee in Bankruptcy. The Second Circuit again held, in the case of *Reich v. Industrial Com'r of New York* (2 C.C.A.), 145 F. (2d) 759, 57 A.B.R. (N.S.) 633, that it was error for a District Court to reverse a Referee in Bankruptcy when the decision of the latter was based upon substantial evidence adduced at the hearing before the Referee. On page 761 Judge Augustus N. Hand, speaking for the Court, said:

> "If the finding by the referee that the salaries were conditional upon earnings and were in effect only payable out of them was founded on substantial evidence, as we think it was, the District Court was not justified in disregarding his conclusions."

The Trustee, in the pending matter, respectfully submits that there is no error in the Findings of Fact of the Referee in Bankrupty. The provisions of Su-

preme Court General Order No. XLVII are mandatory upon the District Court requiring the Judge thereof to accept said Findings of Fact. In the decision of the District Court no error was mentioned by it in connection with these Findings of Fact and the Court plainly erred in reversing the Order of the Referee in Bankruptcy on which the Findings of Fact and Conclusions of Law were predicated.

V.

INSOLVENCY OF APPELLEE NOT A PREREQUISITE TO ISSUANCE OF TURNOVER ORDER.

In its opinion (Tr. p. 26) the District Court held that the Referee had not found Appellee to be an insolvent, and that if the Order of the Referee should be upheld, the result would be an unlawful preference of creditors by the Bankruptcy Court in that debts of Appellee, contracted in his own name and not in the name of the corporation, and outstanding and unpaid, would not be taken into consideration in the distribution of all of his assets.

It is respectfully argued that this result would not at all be certain. A Turnover Order directed against a person other than a bankrupt is not uncommon, and as a parallel to the present facts and circumstances Appellant calls attention to the well sanctioned practice of bringing in individual estates of solvent partners for administration by the Bankruptcy Court where the firm alone is adjudicated a bankrupt.

In referring to this latter practice, it was said in *In re Meyers,* 98 Fed. 975 (C.C.A., N.Y.):

> "We are of the opinion that it is the scheme of these provisions to treat the partnership as an entity which may be adjudged a bankrupt by voluntary or involuntary proceeding, irrespective of any adjudication of the individual members as bankrupt, and upon an adjudication to draw to the administration the individual estates of the partners as well as the partnership estate, and marshal and distribute them according to equity. The assets of the individual estates and the debts provable against them can be ascertained without adjudicating the individual partners bankrupt. The language does not require such an adjudication."

Were Appellee an insolvent (a fact not in evidence as Appellee has never asserted that he did not have the means with which to comply with the Order of the Referee), the Referee could require or permit Appellee's individual creditors to present their claims to the Court for *pro rata* participation on an *equal basis* with creditors of the bankrupt corporation, in the proceeds of any assets of Appellee turned over to Appellant in response to the Order of the Referee.

Such procedure is exactly the same as consolidating the estates of two bankrupts for purposes of administration, where their interests are so linked or commingled as to require or recommend such action. *In re Foley,* 9 Cir., 4 F. (2d) 154.

CONCLUSION.

It is respectfully urged that the Order of the District Court setting aside the Order of the Referee in Bankruptcy directing Appellee to turn over to Appellant his sole individual assets be reversed.

Dated, San Francisco, California,
July 26, 1948.

Respectfully submitted,
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